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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

PAUL SOMERS, an individual,

Case No. 3:14-cv-05180 EMC (KAW)

Plaintiff,

MOTION IN LIMINE NO.: 1

v.
DIGITAL REALTY TRUST, INC., a Maryland corporation; ELLEN JACOBS, an individual, and DOES ONE through TEN, inclusive,

**ORDER TO EXCLUDE EVIDENCE
PLAINTIFF DID NOT DISCLOSE
DURING DISCOVERY**

Defendants.

Date: August 2, 2018
Time: 1:30 p.m.
Place: San Francisco Courtroom 05
(17th Floor)

Defendants move this Court *in limine* for an order to exclude evidence Plaintiff did not disclose during discovery. Federal Rule of Civil Procedure 26(a) requires parties to disclose certain evidence to the other parties in an action without awaiting a discovery request. Further, a party is under a continuing obligation to supplement its prior productions if it learns that the production is incomplete or incorrect. If a party does not provide information or identify a witness as required by Rules 26(a) and (e), then,

1 pursuant to Federal Rule of Civil Procedure 37, “the party is not allowed to use that information or
 2 witness to supply evidence on . . . at a trial” FED. R. CIV. P. 37. *See* Fed. R. Civ. P. 37, Notes of
 3 Advisory Committee on Rule - 1993 Amendment; *Hoffman v. Constr. Protective Serv., Inc.*, 541 F.3d
 4 1175, 1179 (9th Cir. 2008). This sanction is “self-executing” and “automatic,” absent a determination of
 5 either substantial justification or harmlessness. Fed. R. Civ. P. 37, Notes of Advisory Committee on
 6 Rule - 1993 Amendment.

7 Defendants anticipate Plaintiff will attempt to introduce or refer to an audio recording not
 8 previously produced in discovery. In filings with the Court after the close of discovery, Plaintiff
 9 disclosed the purported existence of a recording he claims to have of a January 2014 review meeting
 10 between he and his manager, Kris Kumar. Plaintiff says Kumar can be heard praising Plaintiff on the
 11 recording:

12 Plaintiff legally recorded his annual review with Kris Kumar on January 29, 2014.
 13 Statements made by Mr. Kumar were favorable. Plaintiff was told that he was
 14 performing “very well,” and things were ‘hunky dory.’

15 Dkt. No. 268, CMC Statement at 2:24-3:2. Plaintiff did not produce this recording during discovery.
 16 Upon learning of the alleged recording through the CMC Statement, Defendants advised Plaintiff and
 17 the Court they would seek to exclude the recording due to Plaintiff’s failure to produce it during
 18 discovery. *See* Dkt. No. 268, CMC at 13:13-15. Plaintiff has still not produced the recording, nor has he
 19 offered any explanation for not doing so, let alone substantial justification.

20 In determining whether to preclude introduction of evidence pursuant to FRCP 37, courts
 21 consider “(1) the surprise to the party against whom the evidence would be offered; (2) the ability of that
 22 party to cure the surprise; (3) the extent to which allowing the evidence would disrupt the trial; (4) the
 23 importance of the evidence, and (5) the nondisclosing party’s explanation for [its] failure to disclose the
 24 evidence.” *S.F. Baykeeper v. W. Bay Sanitary Dist.*, 791 F.Supp.2d 719, 733 (N.D.Cal.2011) (the
 25 “Baykeeper Factors”). Applied here, the Baykeeper Factors all weigh in favor of excluding the withheld
 26 evidence.

27 First, the element of surprise indisputably supports excluding the recording because Defendants
 28 have not heard it and do not know what it says. It is therefore axiomatic that the contents of the
 recording would come as a complete surprise to Defendants. This just the sort of “evidentiary ambush”

1 Rules 26 and 37 are “designed to prevent.” *United States v. Proctor & Gamble Co.*, 356 U.S. 677, 682
 2 (1958).*Assibey-Mensah*, 2016 WL 866705, at *2 (citing *United States v. Procter & Gamble Co.*, 356
 3 U.S. 677, 682 (1958)). Were this Court to allow Plaintiff to introduce the recording, Defendants would
 4 be unable to properly defend against the surprise evidence.

5 Second, Defendants cannot cure the surprise. Discovery is closed and the case is set for trial on
 6 December 3, 2018. In order to cure the surprise, Defendants would need to re-engage in discovery to
 7 seek the deposition of the other participant in the allegedly recorded call. According to Plaintiff, the
 8 recording is of a conversation between he and his former manager, Kris Kumar. Mr. Kumar is no longer
 9 affiliated with Digital and, upon information and belief, lives and works outside of the United States.
 10 Pursuing his deposition, therefore, would require invoking the Hague Evidence Conventions, a process
 11 that can take months. Defendants therefore cannot cure the surprise before the scheduled trial.

12 Third, allowing the recording into evidence would disrupt the scheduled trial and therefore
 13 weighs in favor of preclusion. If Plaintiff is allowed to introduce the recording, the trial date would need
 14 to be moved to allow Defendants the opportunity to collect rebuttal evidence and/or pursue the
 15 deposition of Mr. Kumar. As noted above, because he is a foreign national outside of the United States,
 16 that process is unlikely to be completed in advance of the scheduled trial date.

17 The fourth Baykeeper factor considers the importance of the evidence. It appears from Plaintiff’s
 18 position in the CMC Statement that he intends to use the alleged recording to rebut Digital’s legitimate
 19 non-discriminatory and non-retaliatory reason for terminating his employment, which goes to the crux of
 20 Plaintiff’s wrongful termination claims. (Dkt. No. 268.) Given this, the admission of non-disclosed
 21 information would substantially prejudice Defendants as they were not afforded the opportunity to
 22 investigate or refute the evidence.

23 Finally, the fifth factor weighs strongly in favor of exclusion. Plaintiff has offered up no reason
 24 for his failure to produce the recording, let alone one that would substantially justify his continued
 25 refusal to produce the recording. (Dkt. No. 268.)

26 Because all five of the Baykeeper factors weigh in favor of exclusion, the Court should grant
 27 Defendants’ motion in limine and bar Plaintiff from introducing or referring to the alleged recording
 28 during trial.

1 DATED: June 14, 2018

2 Respectfully submitted,

3 SEYFARTH SHAW LLP

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